

REMARKS

The claims are 1-4, 7, 8 and 10-24. Claims 1, 3, 4, 6, 7, 14, 16, 18 and 20 have been amended, and claims 5 and 9 have been cancelled without prejudice or disclaimer. New claims 21-24 have been added. Claims 1, 3, 7, 14, 16, 18, 21 and 22 are in independent form. Favorable reconsideration and allowance of the subject application are respectfully requested in view of the following comments.

Claims 1, 3 and 7 have been amended by changing the protein range to about 8 to about 40 g and the fat range to about 3 to about 8 g. In addition, all the independent claims now include defined groupings for the carbohydrates, fortification components, protein and fat ingredients that are included in the energy bar. Support for the amendments can be found, for example, in paragraphs 18, 44, 46, 50, 66, 83, 108 and 116 of the specification. Accordingly, no new matter has been added.

Claims 4 and 6 have been amended for purposes of clarification. Claim 20 has been amended to correspond to the amendment to claim 18.

New claims 21-24 have been added to provide Applicants with a more complete scope of coverage of their invention. Support for claims 21-24 can be found, for example, in paragraphs 18, 44, 46, 50, 66, 83, 85, 86, 108 and 116 of the specification.

Initially, Applicants would like to thank the Examiner for the kind courtesy of the Interview of October 6, 2005.

Claims 1-13 and 18-20 stand rejected under 35 U.S.C. § 103(a) as allegedly being obvious over U.S. Patent No. 4,055,669 ("*Kelly*") in view of U.S. Patent No. 6,592,915 ("*Froseth*") and a recipe for Pfeffernusse found in the book titled, Joy of Cooking ("*Rombauer*"), on page 708. Claims 14-17 stand rejected under 35 U.S.C. § 102(b) as allegedly being

anticipated by *Rombauer*. Applicants respectfully traverse these rejections, in view of the comments set forth below.

Claim 1 is directed to an energy bar, which has about 2 to about 55 g of carbohydrates, about 1 to about 4.5 g of fortification components, about 8 to about 40 g of protein, about 3 to about 8 g of fat, about 150 to about 300 calories, and a moisture content of less than about 15% by weight, based on a 55 g serving size. The carbohydrates are selected from the group consisting of starch, sugar, gels, syrups, honey, molasses, and combinations thereof. The fortification components are selected from the group consisting of vitamins, minerals, fiber, antioxidants, amino acids, herbal supplements, polyphenols, and combinations thereof. The protein is selected from the group consisting of whey protein, milk protein, egg protein, casein, peanut flour, nut meats, vegetable protein, and combinations thereof. And, lastly, the fat is selected from the group consisting of chocolate, peanut butter, fat substitutes, vegetable fats, tropical fats, animal fats and combinations thereof.

An important objective of the present invention is to provide a good tasting energy bar that delivers nutrients within defined carbohydrate, fortification component, protein, fat, calorie and moisture ranges. To ensure that the energy bar has a superior taste, the energy bar recited in claim 1 must have a hedonic score for consumer acceptability of at least 5.2.

Kelly discloses a food composition made of cereal particles and a binder. The binder includes a protein source coated with an edible fat.

Froseth discloses a layered cereal bar having identifiable ready to eat cereal pieces and at least one visible filling layer. The cereal bar has a total nutrient level equal to or greater than the nutrient level of a single serving of boxed cereal with milk.

Rombauer is cited for disclosing a recipe for Pfeffernusse, which the Office Action alleges, is “an energy matrix made of corn syrup which is combined with a solid component which is grated lemon rind, which is mixed into a fat-carbohydrate matrix, which is butter and sugar (page 708).” See p. 5 of the Office Action.

As discussed in Applicants’ Amendment dated April 4, 2005, neither *Kelly*, *Froseth*, nor *Rombauer* teach or suggest compositions that would qualify as an energy bar as set forth in claim 1. The compositions of *Kelly* were determined to have a minimum of 11 g of fat, which exceeds the permissible amount set forth in claim 1 of about 3 to about 8 g of fat, based on a 55 g serving size. The composition of *Froseth* has only 0.66 g of a fortification component, which is below the range of about 1 to about 4.5 g of fortification components. And, the Pfeffernusse composition has a protein content of approximately 4.6 g, which is outside the protein range of about 8 to about 40 g of protein, as set forth in claim 1. Moreover, the Pfeffernusse composition does not contain fortification components. Therefore, the requirement of about 1 to about 4.5 g of fortification components set forth in claim 1, would exclude the Pfeffernusse composition from being considered an energy bar. As such, the compositions of *Kelly*, *Froseth*, and *Rombauer* do not qualify as energy bars.

Additionally, Applicants note that on page 3 of the Office Action, the Examiner cites col. 6, lines 38-60 of *Kelly*, stating that “[t]he protein powder is sodium caseinate which has been rolled with other ingredients to the size of 50 microns as in claims 6 and 10. The protein powders would have had to have been about the claimed caseinate size of at least 35 microns since all the ingredients are 50 microns (col. 6, lines 38-60).”

Applicants wish to point out that the Examiner’s statement assumes that the sodium caseinate (protein powder) had an average particle size greater than 35 microns prior to

combining it with the sugar, nonfat milk solids and fat to form the crude mixture. However, Applicants have found nothing in *Kelly* to indicate what particle size sodium caseinate was used in the crude mixture. Therefore, Applicants respectfully disagree that processing the crude mixture through the roll mill ensures that all ingredients will have an average particle size of 50 microns. For example, the sodium caseinate may have an initial average particle size less than 30 microns before being combined with the sugar, nonfat milk solids and fat to form the crude mixture, and the reason for milling the crude mixture is to reduce the particle size of the sugar and/or nonfat milk solids. After the roll milling step, the sodium caseinate will still have an average particle size of less than 30 microns. Therefore, it is respectfully submitted that *Kelly* does not teach or suggest including a protein powder, where at least 30 wt. % of the protein powder has a mean particle size of at least about 35 microns.

As such, Applicants respectfully submit that *Kelly*, *Froseth*, and *Rombauer*, whether taken alone or in any permissible combination, do not disclose or suggest the presently claimed invention of an energy bar that provides about 2 to about 55 g of carbohydrates, about 1 to about 4.5 g of fortification components, about 8 to about 40 g of protein, about 3 to about 8 g of fat, about 150 to about 300 calories, and a moisture content of less than about 15% by weight, based on a 55 g serving size, as set forth in claim 1.

Claim 2 directly depends from claim 1. For at least the same reasons discussed above in connection with claim 1, claim 2 is patentable over *Kelly*, *Froseth*, and *Rombauer* whether considered alone or in any permissible combination.

Independent claims 3 and 7 have essentially the same requirements as claim 1, with the exception that claim 3 is directed to a grain based energy bar and claim 1 is directed to a chewy energy bar.

Accordingly, for at least the same reasons discussed above for claim 1, claims 3 and 7 are patentable over *Kelly*, *Froseth*, and *Rombauer*, whether considered alone or in combination.

Claims 4 and 6 depend from claim 3, and claims 8 and 10-13 directly or indirectly depend from claim 7. For at least the same reasons discussed above in connection with claims 3 and 7, claims 4, 6, 8 and 10-13 are patentable over *Kelly*, *Froseth*, and *Rombauer* whether considered alone or in any permissible combination.

Claim 18 is a method for improving the mean hedonic score of an energy bar. This is achieved by (a) processing process sensitive ingredients in a manner to preserve the integrity of the process sensitive ingredients by controlling the temperature and/or shear energy imparted on the process sensitive ingredients; (b) including a fat-carbohydrate matrix with an energy bar matrix; and/or (c) using protein powders that have a particle size distribution such that at least about 30 wt.% of the protein powder has a mean particle size of at least about 35 microns.

Neither *Kelly*, *Froseth*, nor *Rombauer* teach or suggest the above noted techniques set forth in (a), (b) and/or (c) as a means for improving the taste of an energy bar. As such, claim 18 is patentable over *Kelly*, *Froseth*, nor *Rombauer* whether taken alone or in combination.

Claims 19 and 20 directly depend from claim 18. For at least the same reasons discussed above in connection with claim 18, claims 19 and 20 are patentable over *Kelly*, *Froseth*, and *Rombauer* whether considered alone or in any permissible combination.

Claim 14 is a product by process claim and claim 16 is a method claim. These claims include the feature of incorporating a fat-carbohydrate matrix into an energy bar matrix to

form an enhanced energy bar matrix. The fat-carbohydrate matrix is comprised of one or more fats and one or more carbohydrate components. The resulting energy bar has a lubricious mouthfeel. In addition, claims 14 and 16 have been amended to include the defined groupings for the carbohydrate, fortification component, protein and fat, recited in claim 1.

Rombauer's Pfeffernusse composition, discussed previously, does not include fortification components. Therefore the Pfeffernusse composition does not meet the fortification range of about 1 to about 4.5 g, set forth in claims 14 and 16. In addition, it is respectfully submitted that the step of mixing an energy bar matrix with a fat-carbohydrate matrix to form an enhanced energy bar matrix is not disclosed. Moreover, it is clear that a Pfeffernusse composition does not disclose an energy bar composition with a lubricious mouthfeel. As such, claims 14 and 16 are clearly patentable over *Rombauer*.

Claim 15 depends from claim 14, and claim 17 depends from claim 16. Claims 15 and 17 are also patentable over *Rombauer* for the same reasons discussed above for claims 14 and 16.

New claim 21 is an energy bar which includes the feature of an energy bar matrix combined with a fat-carbohydrate matrix in a weight ratio of about 99:1 to about 80:20. The energy bar matrix is comprised of a solid component selected from the group consisting of corn starch, oat, rice, wheat, barley, cereal, grains, sorghum, protein, salt, flavors, cocoa powder, flour, fortification blends, sugars, and combinations thereof, and a carbohydrate based syrup selected from the group consisting of corn syrups, liquid sucrose, honey, high fructose corn syrup, glycerin, and combinations thereof. The fat-carbohydrate matrix is comprised of about 2 wt.% to about 25 wt.% of one or more fat components selected from the group consisting of chocolate, peanut butter, fat substitutes, vegetable fats, tropical fats, animal fats and

combinations thereof, and about 10 wt. % to about 75 wt. % of one or more carbohydrate components selected from the group consisting of starch, sugar, gels, syrups, honey, molasses, and combinations thereof.

Applicants respectfully submit, that *Kelly, Froseth, and Rombauer*, whether taken alone or in any permissible combination, do not disclose or suggest the above noted features of claim 21. As such, claim 21 is patentable over the above references.

New claim 22 includes the feature of a protein powder, where at least 30 wt. % of the protein powder has a mean particle size of at least about 35 microns.

Nothing has been found in *Kelly, Froseth, and Rombauer*, that would teach or suggest using a protein powder having the particle size distribution set forth in claim 22. As such, claim 22 is patentable over *Kelly, Froseth, and Rombauer* whether taken alone or in any permissible combination.

Claims 23 and 24 depend from claim 22. For at least the same reasons as claim 22, claims 23 and 24 are patentable over each of the cited references whether considered separately or in combination.

Applicants respectfully submit that a prima facie case of obviousness has not been established.

Moreover, Applicants respectfully submit that even if a prima facie case were deemed to have been established, that the secondary considerations of long felt need and commercial success clearly overcome any such prima facie case deemed established.

Applicants note that energy bars were first marketed in the late seventies to early eighties. In 1997, an estimated \$200 million dollars were spent on energy bars. Since then, their popularity as a convenient source of nutrition has grown significantly among consumers. In fact,

consumers spent an estimated \$900 million dollars on energy bars in 2001. And, in 2005, it is expected that over \$1 billion dollars will be spent.

Manufacturers of energy bars seek to provide a product that delivers nutritional benefits, but have found that doing so with acceptable taste is very difficult. Much effort has been expended over the last two decades on improving the taste of the product without significant success. This has proved to be a difficult goal to achieve, as the majority of energy bars that are currently marketed still do not meet consumers' taste expectations. Consumers typically complain that energy bars are too dry, chewy, chalky, sandy, crumbly, disgusting, etc. Many consumers who buy energy bars have largely accepted the inferior taste, believing that taste had to be sacrificed to gain the nutritional benefits. Clearly, most consumers have not been satisfied with the available choices in energy bar products that are available.

Applicants' invention provides a product and a process to meet the long felt need of consumers, i.e., a good tasting energy bar. In the present invention, this is achieved by carefully combining the recited ingredients in a manner and in amounts that produce an exceptionally good tasting energy bar, which has a superior taste, texture, and appearance that consumers want.

Moreover, energy bars of the presently claimed invention have found tremendous commercial success.

This is evidenced by the success of the commercial embodiments of Applicants' invention, sold under the brand name SNICKERS MARATHON®. Two energy bars were initially introduced into the energy bar market in 2003, SNICKERS MARATHON Multi-Grain Crunch® and SNICKERS MARATHON Chewy Chocolate Peanut®. These were later followed by SNICKERS MARATHON Caramel Nut Rush®, SNICKERS MARATHON Chocolate Nut

Burst®, SNICKERS MARATHON Peanut Butter Low Carb® and SNICKERS MARATHON Chocolate Fudge Brownie Low Carb® energy bars.

In 2005, the sales velocity (a measurement of how quickly a product moves off the shelf) for each of these bars exceeded expectations. SNICKERS MARATHON Multi-Grain Crunch® is the #1 selling energy bar, followed by SNICKERS MARATHON Caramel Nut Rush® at #2. SNICKERS MARATHON Chewy Chocolate Peanut® is at #4 and SNICKERS MARATHON Chocolate Nut Burst® is at #5. A couple of more recently introduced energy bars, SNICKERS MARATHON Peanut Butter Low Carb® is at #10 and SNICKERS MARATHON Chocolate Fudge Brownie Low Carb® is at #12. Thus, in the short span of less than 2 years, SNICKERS MARATHON® has taken over the 1st, 2nd, 4th and 5th positions as the fastest selling energy bars in the market. This is a significant achievement, considering that established brands such as POWERBAR® have been around since 1988. The success of SNICKERS MARATHON® energy bars has a clear nexus to the process of the present invention, which provides a means of achieving an energy bar having outstanding taste and has not been the result of simply marketing. This can be seen by the fact that in 2005, far more advertising dollars were expended on POWERBAR®s (\$15 million vs. \$4 million for SNICKERS MARATHON® bars) and SNICKERS MARATHON® bars have still outsold the POWERBAR®s. Consumers are clearly welcoming the new offerings from SNICKERS MARATHON® in the energy bar category, which are manufactured using Applicants' invention. See Exhibit A.

Further evidence of success is based on SNICKERS MARATHON® having received more than 50 awards, including over 10 major awards since 2003. For example,

SNICKERS MARATHON Energy Bar Double Chocolate Nut®, the newest introduction, has received the Best Bar in Health's Best of Fitness awards 2006. See Exhibit B.

Applicants are preparing a Declaration to support the non-obviousness of the present invention based on the above noted secondary consideration and intend to submit the Declaration shortly.

As previously noted, on October 6, 2005, Applicants, and Applicants' representative conducted an interview with Examiner Pratt. During that interview, Applicants discussed how the present invention improves the taste of energy bars through formulation and processing techniques. For example, preserving the integrity of process sensitive ingredients has been found to improve the taste of the product. This is achieved by controlling the temperature and shear energy imparted on the process sensitive ingredients. Another way of improving the taste of the energy bar is by incorporating a fat-carbohydrate matrix with the energy bar matrix, which enhances the textural attributes. Applicants also described how protein powders can have a negative impact on taste, creating a drying sensation. Applicants have found that by using protein powders that have a particle size distribution where at least about 30 wt.% of the protein powder has a mean particle size of at least about 35 microns, counteracts the drying sensation.

As a further example of how to improve the taste of the energy bar through processing, Applicants showed the Examiner two samples of binder syrup. The first sample was made by mixing ingredients at a temperature of around 82°C at high shear. The second sample (of the invention) was manufactured within the temperature and shear ranges set forth in claim 1, where the temperature was held at around 66°C and mixing was performed at low shear. It was evident to the Examiner, Applicants and Applicants' representative that the first sample and second sample were very different. The first sample had an unpleasant vitamin smell, and the

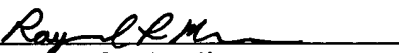
binder syrup was a greenish tinted color. The first sample was also rather viscous, which is not a desirable attribute since highly viscous binder syrups have a negative impact on taste and texture, making the final product tougher to chew. On the other hand, the second sample (of the invention) had a neutral smell and was a golden yellow color. In addition, the viscosity of the second sample was much lower and more suitable for use in an energy bar.

Furthermore, during the interview, the Examiner commented that she was unaware of any U.S. Patents where sensory values form a part of the claims. However, Applicants respectfully direct the Examiner's attention to, for example, U.S. Patent No. 6,720,015 titled "Ready To Eat Nutritionally Balanced Food Compositions Having Superior Taste Systems," which issued on April 13, 2004 to Prosis et al. Clearly sensory value limitations have been allowed on other patent cases.

In view of the foregoing remarks, Applicants respectfully request favorable reconsideration and early passage to issue of the present application.

Applicants' undersigned attorney may be reached in our New York office by telephone at (212) 218-2100. All correspondence should continue to be directed to our below listed address.

Respectfully submitted,


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	UNIT PRICE	QUANTITY	AMOUNT	TAX	TOTAL
54 HERSHEY'S SMART ZONE PEANUT BUTTER & COCO	\$ 1.08	1	\$ 1.08	\$.07	\$ 1.15
56 HERSHEY'S SMART ZONE CHOCOLATE NUTRITION \$	\$ 1.25	1	\$ 1.25	\$.07	\$ 1.32
57 HERSHEY'S SMART ZONE STRAWBERRY NUTRIBIC \$	\$ 2.44	1	\$ 2.44	\$.17	\$ 2.61
102 HERSHEY'S SMART ZONE CRUNCHY PEANUT BUT \$	\$.71	1	\$.71	\$.05	\$.76
119 HERSHEY'S SMART ZONE CHOCOLATE BROWNIE \$	\$.84	1	\$.84	\$.05	\$.89

September 19, 2005

BEST AVAILABLE COPY EXHIBIT B

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Dear Bertille,

Congratulations! Your product, Snickers Marathon Energy Bar, Double Chocolate Nut, has been named Best Bar in Health's Best of Fitness awards 2006.

Our expert panel of judges, including *Health* contributor Petra Kolber and American Council on Exercise spokesperson Richard Cotton, singled out your product among over 500 entries in 6 major categories (footwear, apparel, fuel, equipment, gear, and DVD/videos). The winners will be featured in *Health*'s January/February issue (on newsstands December 29).

In addition to the story—an annual favorite among our 7.3 million readers—winners earn the right to display *Health*'s Best of Fitness seal on promotional materials, product packaging, websites, etc. (You will receive a separate communication with details on using the seal in the next several days.)

Thank you for participating in this program, which gives our readers the guidance in an area that's so crucial to their physical and emotional well-being. And, again, congratulations from all of us at *Health*.

Sincerely,



Lisa Delaney
Special Projects Director
Health

Health